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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1594

KENNEBEC LOG DRIVING COMPANY,
SCOTT PAPER COMPANY,
HUDSON PULP & PAPER CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
ISSUE PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	13
I. IN TWO SIGNIFICANT RESPECTS THE OPINION BELOW IS PLAINLY INCONSISTENT WITH VERY RECENT DECISIONS OF THIS COURT	13
II. THE DECISION BELOW THREATENS THE VERY EXISTENCE OF A FORM OF INDUSTRIAL ACTIVITY WHICH HAS ENJOYED CONGRESSIONAL PROTECTION FOR THREE-QUARTERS OF A CENTURY	17
III. THE IMPORTANT ISSUE PRESENTED HERE IS RIPE FOR REVIEW BY THIS COURT	18
CONCLUSION	20
APPENDICES	1a

TABLE OF CITATIONS

CASES:

Train v. *NRDC*, 421 U.S. 60 (1975) 16, 17
United States v. *Pennsylvania Indus. Chem. Corp.*, 461 F.2d 469 (3d Cir. 1973), *rev'd*, 411 U.S. 655 (1973) 11, 13-17

STATUTORY PROVISIONS:

Rivers and Harbors Act of 1899
- Section 13, 33 U.S.C. § 407 ..... passim
- Section 15, 33 U.S.C. § 409 ..... 3, 5
- Section 16, 33 U.S.C. § 411 17

Act of May 9, 1900, 33 U.S.C. § 410 ..... passim

Page

Federal Water Pollution Control Act Amendments of 1972 ..... 11, 12

13 U.S.C. § 1288 12

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1292(b) 9

33 U.S.C. § 1342(a)(5) 12

33 U.S.C. § 1362(14) 12

Private and Special Laws of Maine of 1829-35, ch. 590 (1835) 4

LEGISLATIVE MATERIALS:

Report of the Secretary of War on the Kennebec River, H.R. Doc. No. 658, 71st Cong., 3rd Sess. 2 (1930) 6

MISCELLANEOUS:

Development Document for Proposed Effluent Limitation Guidelines and New Source Performance Standards for the Wet Storage, Sawmills, Particleboard and Insulation Board Segment of the Timber Products Processing Point Source Category (EPA August 1974) 13

Log Storage: Rafting in Public Waters: A Task Force Report Approved by the Pacific Northwest Pollution Control Council 13

Processes, Procedures and Methods to Control Pollution Resulting from Silviculture Activities (EPA October 1973) 12

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit in *United States of America* v. *Kennebec Log Driving Company, et al.*, entered February 18, 1976. That judgment affirmed an order of the District Court for the District of Maine, which granted summary judgment in favor of the plaintiff United States on August 8, 1975.

OPINIONS BELOW

Thus far there have been four opinions rendered in this litigation. The first was an opinion of the District Court (per Gignoux, J.) granting summary judgment in favor of the petitioners (the defendants in the action) and dismissing the Complaint filed by the United States. That opinion is reported at 356 F. Supp. 344 (1973).

The second opinion was an opinion of the Court of Appeals for the First Circuit which reversed the District Court in part and remanded the case for further proceedings. That first opinion of the Court of Appeals is reported at 491 F.2d 562 (1973). A petition for certiorari review of that decision was denied. 417 U.S. 910 (1974).

The third opinion was that of the District Court granting summary judgment for the plaintiff-respondent, the United States, on the issue of liability. It is unreported but is printed as Appendix A to this petition (App. 1a-13a).

The fourth opinion, for which review is now sought, is that of the Court of Appeals affirming the District Court's summary judgment on the issue of liability and remanding the case to the District Court for further proceedings relating to relief. The opinion and order of the Court of Appeals, which has not been reported, is printed as Appendix B to this petition (App. 14a-22a).

JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1976, and is printed as Appendix C (App. 23a). On March 17, 1976, the Court of Appeals denied a timely motion for a stay of the mandate; that order is printed as Appendix D (App. 24a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

ISSUE PRESENTED

It is undisputed (1) that since colonial days "river log driving" has been an established and important means of commercial navigation; (2) that every log-floating and driving operation ever conducted on the

rivers of this country has inevitably and unavoidably involved some "sinkage" of logs and bark; (3) that the United States Congress and the Secretary of the Army (formerly the Secretary of War) have been fully aware, since at least as early as 1899, that all transportation of logs by water has involved such sinkage; (4) that in 1899 Congress enacted the Refuse Act (Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407) which flatly prohibits all deposits of refuse without a permit from the Secretary of the Army; and (5) that for 72 years after the passage of the Refuse Act both the Congress and Secretary of War treated log driving as a totally lawful activity without regard to the fact that no one had ever sought or obtained a permit with respect to such activity.

The question presented is whether the Court of Appeals was correct in holding (a) that the Secretary of the Army had an affirmative statutory duty under the Refuse Act to institute a permit program for log drivers and thereby to administratively define an "exemption" from the Refuse Act for such log drivers and (b) that in the absence of a permit (none such ever having been issued) every log driving operation conducted on the rivers of this country since 1899 has been and continues to be illegal.

STATUTORY PROVISIONS INVOLVED

The provisions of Sections 13 and 15 of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 407 and 409, and of the Act of May 9, 1900, 33 U.S.C. § 410, are set forth in relevant part in Appendix E (App. 25a).

STATEMENT OF THE CASE

The revelant facts are as follows:

(1) In 1835 petitioner Kennebec Log Driving Company (hereinafter "KLD") was created as a membership corporation under a special charter granted by the Legislature of the State of Maine.[1] For the past 141 years KLD and its members have conducted an annual log drive from the head waters of the Kennebec River down to various riparian industrial facilities located upriver from the City of Augusta, Maine. Throughout that 141-year history log driving has been the only form of commercial navigation on the foregoing stretch of river.

(2) The annual Kennebec log drive, like every other log drive on every other river in this country, has always inevitably and unavoidably involved some "sinkage" of logs and bark. All of the parties and both of the courts below have recognized that log driving simply cannot be conducted without such "sinkage."[2]

(3) In the proceedings below the District Court (Gignoux, J.) made two significant and unchallenged findings of fact as to the attitude of Congress toward log driving and its inevitable sinkage. Judge Gignoux found (a) that from at least as early as 1899 Congress has regarded log driving as "an important form of commercial navigation" (App. 8a) and (b) that from at least as early as 1899 Congress has been fully aware that "every log drive inevitably involve[s] some degree of sinkage of logs and bark." (App. 8a).

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[1] Private and Special Laws of Maine of 1829-35, ch. 590 (1835).

[2] 356 F. Supp. at 350; App. 8a; 491 F.2d at 564.

(4) In 1899 Congress enacted the so-called Refuse Act as Section 13 of the Rivers and Harbors Act, now codified as 33 U.S.C. § 407. Stated simply, the Refuse Act flatly prohibits any deposit of any sort of refuse unless the responsible party has previously obtained a permit from the Secretary of War (now of the Army). It is undisputed in this case that if the language of the Refuse Act is read with complete literalness, the inevitability of sinkage means that every log drive is unlawful in the absence of an Army permit. (Obviously it is the position of petitioners that such a literal interpretation of the Refuse Act was not intended by Congress, as indicated subsequently in this petition.)

(5) As a result of the conflicting interests of log drivers and steamboat operators, in 1899 Congress included in the Rivers and Harbors Act of that year an additional provision (Section 15 of the Act, 33 U.S.C. § 409) declaring that log driving (*i.e.*, the floating of "loose timber and logs") was henceforth prohibited on "streams or channels actually navigated by steamboats."

(6) One year later, in response to complaints from log drivers, Congress decided to change the law with respect to the rivers upon which log driving would be lawful. By the Act of May 9, 1900, which is codified as 33 U.S.C. § 410, the Congress provided that "the prohibition contained" in Section 15 of the 1899 Act, 33 U.S.C. § 409, "against floating loose timber and logs . . . in streams or channels actually navigated by steamboats shall not apply to any navigable river or waterway of the United States . . . whereon the floating of loose timber and logs . . . is the principal method of navigation," provided that log driving navigation should be subject to any regulations which

might be promulgated by the Secretary of the Army. By that 1900 statute, obviously, Congress made clear its intention that log driving should be permitted to continue on rivers like the Upper Kennebec, where log driving has always been the principal (and, in the case of the Kennebec, the only) method of commercial navigation. The 1900 statute is still the law today. 35 U.S.C. § 410.

(7) During the 77-year period since 1899, despite its full awareness that every log drive inevitably involves sinkage (see paragraph 3, *supra*), Congress has never taken any action suggesting that it considers log driving sinkage—and hence log driving itself—to be prohibited by the general language of the Refuse Act of 1899.

(8) From 1899 until 1971, although the Secretary of the Army was fully apprised of the fact that log driving and sinkage were continuing phenomena on the Kennebec and other logging rivers in this country,[3] the Secretary of the Army never sought to establish or enforce any permit program relating to log driving, and he never treated any such drive as being unlawful because of its known and inevitable sinkage. The plaintiff in this action, the United States, and both of the courts below have recognized that for 72 years the Secretary of the Army interpreted the Refuse Act as *not* applying to log driving sinkage.[4]

(9) In 1971 the last active member of KLD (petitioner Scott Paper Company) publicly announced that the Kennebec log drive would come to an end

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[3] *See, e.g.*, Report of the Secretary of War on the Kennebec River, H.R. Doc. No. 658, 71st Cong., 3rd Sess. 2 (1930).

[4] *See, e.g.*, App. 20a; 356 F. Supp. at 352-53.

no later than October 1, 1976. On many other rivers, however, water transportation of logs continues to flourish (see pp. 12-13 *infra*) and presumably will continue to do so unless prohibited by law.

(10) Several months after the foregoing announcement by Scott Paper Company, the Government filed the instant suit against KLD and its members, charging (*inter alia*) that the sinkage inevitably involved in every log drive violates the Refuse Act and that, although the Secretary of the Army has never sought to require permits for log driving and has never received or granted a request for a log driving permit, all log driving in this country has been unlawful since 1899. The Government's accompanying press release acknowledged that the suit was the first of its kind in history. The Complaint requested an injunction against further log drives and retrospective relief to remedy alleged damage to the Kennebec River over the past 72 years.

(11) After discovery in the District Court, both sides filed motions for summary judgment. Petitioners contended (a) that Congress never intended the Refuse Act to apply to log driving sinkage and (b) that, even if the Refuse Act had been intended to apply to log driving when it was enacted in 1899, the Act of May 9, 1900, 33 U.S.C. § 410 (*see* paragraph 6 *supra*), which explicitly authorizes log driving on rivers like the Kennebec, precluded a holding that log driving sinkage and hence all log driving is unlawful. Judge Gignoux felt it unnecessary to reach the first point but agreed with the second (in an opinion which the Court of Appeals later described as "thoughtful and well documented," 491 F.2d at 568); he entered summary judgment for petitioners, dismissing the Government's Complaint. 356 F. Supp. 344.

(12) The Court of Appeals for the First Circuit reversed, holding that the 1900 statute did not have the effect attributed to it by Judge Gignoux. 491 F. 2d 562. On the other hand, the Court of Appeals did not decide whether or not the Refuse Act was intended by Congress to forbid log driving sinkage; instead the Court of Appeals chose to

> ". . . remand for a determination of the question which the court below felt that it did not have to reach: whether there are certain deposits of material into navigable waters so intimately related to the actual conduct of navigation by water that despite the facial applicability of the statute [*i.e.*, the Refuse Act] it could not have been in the contemplation of Congress that it apply in such instances." *Id.* at 570

When petitioners then sought certiorari (No. 73-1266), the Government successfully opposed such review, emphasizing the absence of any final ruling as to the meaning of the Refuse Act and its application to water transportation of logs (Memorandum for the United States in Opposition, pp. 2, 4).

(13) On remand the parties addressed the question whether there were forms of commercial navigation to which certain deposits of material were "intimately related." It was then developed, without dispute, that every properly-operating motor vessel inevitably and unavoidably discharges certain amounts of oil into the water—an indisputable fact which leads logically (in petitioners' view) to the conclusion that, if log driving is unlawful under the Refuse Act because it is inevitably attended by deposits of refuse (*i.e.*, sinkage), then every movement of a motor vessel in commerce since 1899 has also been illegal for exactly the same reason. It is petitioners' position, of course, that (in the phraseology of the Court of Appeals) there is such an intimate relationship between such recognized forms of commercial navigation and their pollutional side effects "that despite the facial applicability of [the Refuse Act] it could not have been in the contemplation of Congress that it apply in such instances."

(14) On remand Judge Gignoux reached the conclusion that certain of the language previously used by the Court of Appeals precluded him from holding that the Refuse Act was inapplicable to log driving sinkage; he felt it his duty to hold that such sinkage does violate the Refuse Act (App. 9a).[5] On his own motion, however, he certified the question to the Court of Appeals for interlocutory review under 28 U.S.C. § 1292(b) (App. 13a).

(15) In its second opinion—the opinion for which review is sought here—the Court of Appeals proceeded from the following basic premises:

(a) First the Court recognized that if all log-driving sinkage were considered to be banned by the Refuse Act, the result would be the "extermination" of that form of navigation—and the Court also recognized that in 1899 Congress did not intend thus to "exterminate" log driving. In the Court's words,

> ". . . Congress would not have wanted to subject the important activity of log driving to extermination under the Refuse Act." (App. 17a).

(b) Proceeding from the foregoing premise the Court of Appeals concluded that Congress must have intended that some degree of log driv-

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[5] Having quoted extensively from the Court of Appeals opinion, Judge Gignoux stated that "[i]n light of this analysis, this Court must reject" defendants' contentions. *Id.*

ing sinkage be exempt from the Refuse Act, so as to allow some degree of log driving commerce to continue, and it was the Court's view that the basic issue which it had to decide was, who should define the exemption? As the court viewed the matter, petitioners were arguing for a judicial exemption(*i.e.*, for a judicial holding that Congress intended log-driving sinkage to be exempt), whereas the court itself preferred that the exemption be defined administratively (*i.e.*, through a permit regime under which the Army would specify the log driving and sinkage which would be permitted to continue). The court took the view, in other words, that it would not be sound policy for the judiciary to decide what was intended to be exempt and that these were problems which should (again as a matter of policy) be left to the responsible administrative agency (App. 17a-20a).

(c) In order to harmonize the statute with the court's own policy view, the Court of Appeals proceeded to interpret the Refuse Act as affirmatively requiring "the Secretary of the Army [to] initiate a permit system" (App. 17a) which would provide an administratively-defined "exemption for normal navigation" in the form of log driving (App. 19a). In the court's view, "Congress intended . . . sensible administrative action" (App. 20a) so that a reasonable degree of log-driving commerce could continue on the logging rivers of this country.

(d) As a corollary, it was the Court of Appeals' view that if the Secretary, motivated perhaps by "Draconian zeal" (App. 20a), should fail to establish a permit program with respect to log driving, and should thus fail to provide any "exemption for normal navigation" by log drivers, it would then be open to aggrieved persons to bring a suit against the Secretary, challenging his action as "arbitrary and capricious" because of its inconsistency with the Congressional intention to allow a reasonable degree of log driving to continue (*id.*). In short, the Court of Appeals interpreted the Refuse Act as placing upon the Secretary a *duty* to create an exemption by "initiat[ing] a permit program" and also as giving aggrieved parties a right to judicial enforcement of that statutory duty.

(e) Finally, recognizing that for 72 years the responsible administrative agency (the Army) had interpreted the Refuse Act as not being applicable to log driving sinkage, the Court of Appeals found it necessary to consider the "weight" to be given to "this administrative interpretation" (App. 20a). In this respect the Court of Appeals looked to this Court's decision in *United States* v. *Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655 (1973) (hereinafter "PICCO"), and concluded therefrom that the Secretary's long-standing administrative interpretation of the Refuse Act should be treated as "not germane" to the problem of interpreting the statute (App. 21a).

(16) In October 1972—more than three years prior to the foregoing holding of the Court of Appeals for the First Circuit—Congress enacted the 1972 Amendments to the Federal Water Pollution Control Act (hereinafter "the FWPCA"). Under that statute the Refuse Act continues to be the law of the land. On the other hand, since its enactment on October 18, 1972, the FWPCA has prohibited the Secretary of

the Army from issuing any permits under the Refuse Act. 33 U.S.C. § 1342(a)(5). The FWPCA authorizes the U.S. Environmental Protection Agency to issue permits for discharges of refuse from "point sources," 33 U.S.C. § 1342, but EPA appears to have taken the position that floating logs do not constitute a "point source".[6] Moreover, petitioners understand that it is the Government's position that a discharge of refuse which falls within the scope of the Refuse Act, and which emanates from a "non-point source," is just as unlawful today as it was prior to the FWPCA. The practical result (assuming that the Government's position in this case is correct) is that, despite the Act of 1900 (see p. 5 supra), the floating of logs on the rivers of this country has been and will continue to be totally banned by the Refuse Act (and subject to criminal penalties), at least until such time as it becomes clear that floating logs constitute a "point source" within the meaning of the statutory definition, 33 U.S.C. § 1362(14), and EPA implements a permit system for such activities.

(17) The Court of Appeals has explicitly recognized that its decision in this case will be applicable wherever water transportation of logs is still carried on and that the issue presented is thus "important". 491 F.2d at 567. According to an official U.S. Government publication, such activities continue to be widespread, particularly in the Pacific Northwest and

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[6] *See Processes, Procedures and Methods to Control Pollution Resulting From Silviculture Activities* 10 (EPA October 1973). If EPA ever wanted to regulate the pollutional effects (if any) of water transportation of logs, it would indisputably have the authority to do so through a statutory "Area wide Waste Treatment Management Program," *see* 13 U.S.C. § 1288, but thus far neither EPA nor any state agency has taken any steps in that direction.

Alaska.[7] Indeed, it has been officially estimated that in the Pacific Northwest alone the annual volume of timber transported by water runs from 2.8 to 3 billion board feet.[8]

REASONS FOR GRANTING THE WRIT

In summary, the writ of certiorari should issue in this case because (1) the decision below is in two respects clearly inconsistent with prior authoritative opinions of this Court; (2) the decision below automatically exposes every logging operator (and, indeed, every operator of a motor vessel) to the threat of severe criminal penalties and possible damages for past conduct, even though the conduct was universally regarded as lawful at the time; (3) the decision below requires every such operation, and hence an entire industry, to be closed down at once if the threat of future penalties is to be avoided; and (4) the decision below, although it left open certain questions relating to injunctive relief against these petitioners, is final and ripe for certiorari review on the question of past and future statutory liability on the part of petitioners, loggers generally, and motor vessel operators.

I. IN TWO SIGNIFICANT RESPECTS THE OPINION BELOW IS PLAINLY INCONSISTENT WITH VERY RECENT DECISIONS OF THIS COURT

In *United States* v. *Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655 (1973) ("PICCO"), this Court

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[7] *See Development Document for Proposed Effluent Limitation Guidelines and New Source Performance Standards for the Wet Storage, Sawmills, Particleboard and Insulation Board Segment of the Timber Products Processing Point Source Category* pp. 14, 19 (EPA August 1974).

[8] *See Log Storage & Rafting In Public Waters: A Task Force Report Approved by the Pacific Northwest Pollution Control Council* 1 (1971).

had occasion to consider whether, when Congress enacted the Refuse Act in 1899, it intended thereby to place upon the Secretary of War an affirmative statutory duty to institute a permit program for the benefit of those who might wish to deposit certain forms of refuse into the navigable waters. In *PICCO* the court below (the Court of Appeals for the Third Circuit) had held in effect that Congress *did* intend the Secretary to establish such a program, 461 F.2d at 475, but this Court disagreed and reversed, squarely holding that, although certain other statutory provisions affirmatively require the responsible administrative agency to institute permissive regulatory programs, there is no such requirement in the Refuse Act. 411 U.S. 662-63, 669. In addition, this Court simultaneously held that any pollutional activity falling within the scope of the Act is absolutely prohibited until such time, if ever, as the Secretary chooses to exempt it. *Id.* at 669.

Given the fact that everyone involved in this litigation (including both of the courts below) agrees that in 1899-1900 Congress wanted log driving (together with its inevitable sinkage) to continue on the logging rivers of this country,[9] we think it logically follows from *PICCO* that Congress did not intend log driving sinkage to be within the scope of the Refuse Act. This Court having declared in *PICCO* that any activity falling within the scope of the Act is absolutely prohibited, *id.*, and that the responsible administrative official (the Secretary of the Army) has no statutory duty to grant any exemption, the only way to harmonize the statute with the recognized Congressional purpose of allowing such navigation to go forward is to hold the Refuse Act inapplicable to any unavoid-

[9] App. 8a-9a; App. 17a.

able pollutional side effects which such navigation may have.

The latter point is strongly confirmed by the problem of motor vessel navigation. As noted above, it has in effect been stipulated in this case that every properly operating motor vessel, as it moves through the water, inevitably discharges oil into the water (see p. 8 *supra*). It is also agreed that the Secretary of the Army has never treated motor vessel navigation as an activity falling within the scope of the Refuse Act. Indeed, the Refuse Act is just one section of a statute designed to protect and promote navigation (*i.e.*, the Rivers and Harbors Act of 1899), which obviously means that it was *not* intended to exterminate all vessel navigation on the rivers of this country. And since there is no administrative duty to create any administrative exemptions from the Refuse Act, we see no escape from the conclusion that the Act was not intended to encompass the unavoidable side effects of either motor vessel navigation or the transportation of logs by water. No other conclusion can be squared with this Court's rulings in *PICCO*.

Although the foregoing considerations were fully argued to the Court of Appeals below, the court did not accept the analysis which appears to be mandated by *PICCO*. Like the Court of Appeals for the Third Circuit in *PICCO* (*i.e.*, the court which this Court reversed in that case), the court below took the view, squarely contrary to this Court's decision, that the Refuse Act placed upon the Secretary of the Army an affirmative statutory duty to implement a permit program for logging and thus to create an administrative exemption from the broad language of the Act. Indeed, the crux of the decision below is the

holding that, if the Secretary failed to establish such a permit program, an interested party could bring suit against the Secretary and obtain judicial relief against such "arbitrary and capricious" administrative action (App. 20a). It is respectfully submitted that the latter holding—the keystone of the result reached below—is plainly inconsistent with *PICCO*.

Moreover, in holding that the long-standing administrative interpretation of the Refuse Act should be treated as "not germane" to the question of statutory interpretation presented for decision in this case, we think that the court below not only misunderstood the implications of another aspect of the *PICCO* decision but also overlooked the principles articulated by this Court in *Train* v. *NRDC*, 421 U.S. 60 (1975). It is true that in the peculiar circumstances presented in *PICCO* this Court declined to allow its decision to be controlled by a prior administrative interpretation of the Refuse Act, but we think that the court below went much too far in suggesting that *PICCO* precludes *any* consideration of prior administrative interpretations. On the contrary, in *Train, supra*, this Court recently held, as it has before, that where a difficult question of statutory interpretation is presented, and where the responsible administrative agency has made a reasonable choice as among the possible interpretations, the administratively-selected interpretation should be "accepted by the reviewing courts." *Id.* at 75. Indeed, where the administrative agency has reasonably interpreted the statute and where (as here) government agencies and affected persons have relied upon that interpretation, that combination of circumstances "*precludes* the Court of Appeals from substituting its judgment for that of the Agency." *Id.* at 87 (emphasis added).

We think there can be no doubt that the instant administrative interpretation (which the court below treated as "not germane") was and is reasonable and that there has been reliance upon it by various government agencies and affected persons. The first judicial opinion rendered in this litigation — a "thoughtful and well documented" opinion by a respected District Judge (Judge Edward Gignoux)—squarely agreed with the 70-year old administrative view that the Refuse Act was inapplicable to log-driving sinkage (a conclusion which we believe is compelled by this Court's decision in *PICCO*), and yet the court below substituted its own judgment for that of the agency in a way which is plainly inconsistent with both *PICCO* and *Train*.

II. THE DECISION BELOW THREATENS THE VERY EXISTENCE OF A FORM OF INDUSTRIAL ACTIVITY WHICH HAS ENJOYED CONGRESSIONAL PROTECTION FOR THREE-QUARTERS OF A CENTURY

Unless certiorari is granted in this case, the decision below will doubtless be regarded (at least by hostile litigants) as controlling with respect to three different types of liabilities:

(1) Section 16 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 411, provides in effect that each separate violation of the Refuse Act "shall be punished by a fine not exceeding $2,500 or less than $500 or by imprisonment . . . for not less than one year, or both such fine and imprisonment . . . ." We understand that it is the position of the United States that in the case of a continuing course of conduct each day's activity should be regarded as a separate offense, which means that, if the ruling below is correct, every well-established logging operator in this country is now potentially liable for staggering criminal penalties.

(2) If the Government's position in this case is the law, the only way for such an operator to avoid liability with respect to future conduct is to close down his operation at once, despite the fact that for the past 77 years it has been—and still is—the policy of Congress to allow log driving to continue on those rivers where that is the principal form of commercial navigation. 33 U.S.C. § 410. Moreover, even if a particular operator were willing to run the risk of incurring additional criminal penalties for future conduct, the Government has insisted that it has the right to a civil injunctive order requiring immediate termination.

(3) Although defenses of various sorts may well be available, every logging operator in this country now faces the possibility of civil damage actions brought by persons who will claim that log-driving sinkage over the past 77 years has done injury to their particular private interests. One such suit has already been filed against petitioners,[10] and others are predictable. In the absence of review by this Court, no logging operator will be in a position to contend in such damage litigation that his activities have not violated the Refuse Act, even though both he and the United States Government regarded those activities as entirely lawful when they were undertaken.

III. THE IMPORTANT ISSUE PRESENTED HERE IS RIPE FOR REVIEW BY THIS COURT

In response to the instant petition the Government will doubtless argue that a final judgment in the litigation must await further proceedings on remand and

[10] Trotzky v. Scott Paper Co., Me. Superior Ct., Kennebec Cty., Civ. Action No. 343 (Motion by William Perry to join as a party and to file amendments to complaint, granted May 4, 1971).

that the issue decided by the Court of Appeals below is therefore not ripe for certiorari review by this Court.

The answer is (a) that the basic thing that remains to be done on remand to the District Court is the formulation of whatever injunctive relief the District Court finds appropriate and (b) that the grant or denial of such relief will have no direct effect on the various exposures (in terms of criminal penalties, business risks, and civil damages) recited in the previous section of this petition. The court below has squarely held that every logging operator in the country is liable under the Refuse Act for prior conduct, and there is nothing now to prevent the consequences from being very severe indeed.

It is true, as the Government will doubtless point out, that after a final judgment (in whatever form) has been entered by the District Court, petitioners will be free to seek review of that judgment in the Court of Appeals and will be free thereafter to seek certiorari review here. But since the Court of Appeals has already given its own final answer to the question of liability, and since it is clear that "there is substantial ground for difference of opinion" on that important issue,[11] a deferral of certiorari review may well result in a substantial waste of litigating effort on the part of the two lower courts and the parties. Judge Gignoux thought it wise that the liability issue be finally resolved before further proceedings took place, and we obviously agree. We therefore

[11] Judge Gignoux, following his last decision, certified to the Court of Appeals below that the issue was "a controlling question of law as to which there is substantial ground for difference of opinion" and that "an immediate appeal from the order may materially advance the ultimate termination of the litigation." (App. 13a).

strongly urge that certiorari review be undertaken at this time.

CONCLUSION

The opinion below decided an admittedly difficult question of law and one considered important by both lower courts. Moreover, the decision below is likely to have serious consequences not only for all logging operators but also for all operators of motor vessels on the rivers of this country. Since this important issue was resolved in a way which seems clearly inconsistent with controlling decisions of this Court, petitioners urge that this petition for certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SOUTHERN DIVISION

Civil No. 12-77

UNITED STATES OF AMERICA, Plaintiff

v.

KENNEBEC LOG DRIVING COMPANY, ET. AL., Defendants

Opinion and Order of the Court

GIGNOUX, J.

This case is here on remand from the United States Court of Appeals for the First Circuit for further proceedings not inconsistent with the opinion of that Court, *United States* v. *Kennebec Log Driving Co.*, 491 F.2d 562 (1st Cir. 1973), vacating the judgment of this Court granting defendants' motion for summary judgment and dismissing the complaint. *United States* v. *Kennebec Driving Company*, 356 F. Supp. 344 (D. Me. 1973). The factual background is fully set forthin the prior reported opinions of this Court and the Court of Appeals. A brief recital of the history of the litigation is, however, essential for an understanding of the issue which has been remanded for this Court's consideration.

I

History of the Litigation

Defendant Kennebec Log Driving Company has been engaged since 1835 in the driving of pulp logs down the upper Kennebec River to paper mills downstream. Defend-

ants Scott Paper Company and Hudson Pulp and Paper Corporation have in the past utilized Kennebec Log Driving Company for this service, but at the present time Hudson Pulp and Paper Corporation no longer continues to do so. In the present action, the United States initially contended that these log-driving activities violate two provisions of the Rivers and Harbors Act of 1899, as amended, 33 U.S.C. § 401 et seq. Specifically, the original complaint charged: (1) that the placing of logs into the river and the contruction and maintenance of log driving "booms" on the river, without prior authorization of the Secretary of the Army, create obstructions to navigation on a navigable water of the United States, in violation of Section 10 of the Act, 33 U.S.C. § 403; and (2) that the settling on the bottom of the river of water-soaked logs and of bark which has peeled from the logs in the course of the log drive, in the absence of a permit from the Secretary of the Army, constitutes an unlawful deposit of refuse matter in a navigable water of the United States, in violation of Section 13 of the Act, 33 U.S.C. § 407.[1] The government seeks an injunction against further log driving and a court order requiring affirmative remedial action, including the removal of all sunken logs and bark from the Kennebec.

On cross-motions for summary judgment, this Court held that the Act of May 9, 1900, 33 U.S.C. §410, exempted from the prohibitions of Sections 10 and 13 of the Rivers and Harbors Act log driving on rivers where log driving is the principal form of navigation and, since it was uncontested that the Kennebec is such a river, that defendants' log-driving activities were legal despite the failure to obtain any permits. The Court of Appeals agreed with this

[1] It is conceded that the upper Kennebec is a navigable water of the United States within the purview of the Rivers and Harbors Act and that defendants have not applied for or obtained any permit or authorization from the Secretary of the Army under Sections 10 or 13 to conduct their log-driving activities.

Court's determination that the 1900 Act exempted defendants' log-driving activities on the upper Kennebec (and its necessary incidents, including the use of logging booms) from the restrictions on obstruction to navigation found in Section 10 of the Rivers and Harbors Act,[2] but concluded that nothing in the 1900 Act exempted defendants' log-driving activities from the pollution control features contained in Section 13 of the Rivers and Harbors Act. Concurring with the findings of this Court that Section 13 is "facially applicable" to defendants' activities and that "peeled bark and sunken logs on the river bottom are deposits of 'refuse matter' within the meaning of Section 13," the Court of Appeals nevertheless remanded the case for a determination of

> . . . whether there are certain deposits of material into navigable waters so intimately related to the actual conduct of navigation by water that despite the facial applicability of the statute it could not have been in the contemplation of Congress that it apply in such instances. 491 F.2 at 570.

In response to plaintiff's motion for reconsideration, in which plaintiff suggested that the foregoing passage constituted an implicit ruling that Section 13 is inapplicable to deposits of refuse "intimately related to the actual conduct of navigation by water," the Court of Appeals made clear that it intended no such ruling and subsequently added the following footnote to this passage of its opinion:

> We mean to intimate no view as to whether or not any such interpretation of the language of the statute can be justified, nor, if it can, whether defendants can take

[2] The Court of Appeals also concurred with this Court's finding that the 1900 Act exempted log driving on rivers like the Kennebec from the complete ban on this activity (when conducted in such a way as to obstruct navigation) contained in Section 15 of the 1899 Act, 33 U.S.C. § 409.

advantage of it. *Id.* at 570 n.27. *See United States* v. *Kennebec Log Driving Co.*, No. 73-1163, Memorandum and Order (1st Cir., Dec. 19, 1973).[3]

In addition, the Court of Appeals volunteered certain comments as to some of the factual considerations to be taken into account in determining the appropriate relief in the event the Court finds a violation of Section 13. 491 F.2d at 571.

Both parties have now filed cross-motions for summary judgment on the issue of the applicability of Section 13 to defendants' log-driving activities. The government also asks that, if the liability issue is resolved against defendants, the Court summarily enter an order enjoining defendants from engaging in any further log driving on the Kennebec and requiring defendants to submit, within a reasonable time, for the Court's approval, a plan for the restoration of the Kennebec to its natural condition.

For the reasons to be stated, the Court holds that Section 13 of the Rivers and Harbors Act is applicable to defendants' log-driving activities on the Kennebec River, but that it would not be proper for the Court, on the present limited record, summarily to enter the injunctive order sought by the government.

II

Applicability of Section 13

The Court cannot accept defendants' argument, that because the settling of water-soaked logs and peeled bark on the river bottom is an inherent part of any log drive (and is thereby intimately related to the conduct of the

[3] The Court of Appeals declined to consider the question of whether defendants' activities violate Section 13 because the point was not decided by this Court and was not "properly or fully presented" to the Court of Appeals. Memorandum and Order of December 19, 1973, *supra*.

log drive), Congress could not have contemplated that Section 13 of the Rivers and Habors Act would apply to this activity. The Supreme Court has made entirely clear that no such restrictive interpretation of the language of the statute as that urged by defendants can be justified.

Section 13 prohibits, in pertinent part, the discharge into navigable waters of the United States of

> any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state,

unless prior permission is obtained from the Secretary of the Army under conditions prescribed by him. 33 U.S.C. § 407.[4] Defendants concede, as this Court, with the con-

[4] Section 13 provides in full:

> It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided*, That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further*, That the Secretary of the Army, whenever in the judgment of the Chief of Engi-

currence of the Court of Appeals, has previously found, that "peeled bark and sunken logs on the river bottom are deposits of 'refuse matter' within the meaning of Section 13." The Supreme Court has found that "the 'serious injury' to our watercourses . . . sought to be remedied [by the Rivers and Harbors Act] was caused in part by obstacles that impeded navigation and in part by pollution," and that the term "refuse" as used in Section 13 includes *all* foreign substances. *United States* v. *Standard Oil Co.*, 384 U.S. 224, 228-29, 230 (1966).

Thus, in *United States* v. *Standard Oil Co., supra,* the Supreme Court made clear that the word "refuse" in Section 13 includes all foreign substances and pollutants, with the single exception, provided in Section 13, or liquid sewage:

> The words of the Act are broad and inclusive: "Any refuse matter of any kind or description whatever." Only one exception is stated: "other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States." More comprehensive language would be difficult to select. The word "refuse" does not stand alone; the "refuse" banned is "of any kind or description whatever," apart from the one exception noted. . . .
> . . . .
>
> That seems to us to be the common sense of the matter. The word "refuse" includes all foreign substanecs and pollutants apart from those "flowing from

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neers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

> streets and sewers and passing therefrom in a liquid state" into the watercourse. 384 U.S. at 229-30.

Any doubt that the term "refuse" as used in Section 13 "includes all foreign substances and pollutants" (other than liquid sewage) is dissipated by the Supreme Court's most recent discussion of Section 13's breadth of coverage in *United States* v. *Pennsylvania Industrial Chemical Corp.*, 441 U.S. 655, 669 (1973):

> Section 13 declares in simple absolutes that have been characterized as "almost an insult to the sophisticated wastes of modern technology" that "[i]t shall not be lawful" to discharge or deposit into navigable waters of the United States "any refuse matter of any kind or description whatever" except as permitted by the Secretary of the Army. (footnote omitted).

See also Illinois v. *City of Milwaukee*, 406 U.S. 91, 101 (1972); *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 490-91 (1960).

Following the Supreme Court's clear and unequivocal mandate in *Standard Oil,* the lower federal courts have consistently read Section 13 in accordance with its plain language and have declined to carve exceptions out of Section 13's all-inclusive coverage of "any refuse matter of any kind or description whatever." *See, e.g., United States* v. *Granite State Packing Co.*, 343 F. Supp. 57, 61 (D.N.H.), *aff'd*, 470 F.2d 303, 304 (1st Cir. 1972); *United States* v. *Esso Standard Oil Co.*, 375 F.2d 621, 623 (3rd Cir. 1967); *United States* v. *Hercules, Inc.*, 335 F. Supp. 102, 104-05 (D. Kan. 1971); *United States* v. *United States Steel Corp.*, 328 F. Supp. 354, 356-57 (N.D. Ind. 1970); *United States Interlake Steel Corp.*, 297 F. Supp. 912, 915 (N.D. Ill. 1969). *See also United States* v. *Pennsylvania Industrial Chemical Corp.*, 329 F. Supp 1118,

1121 (W.D. Pa. 1971), *rev'd on other grounds*, 461 F.2d 468 (3rd Cir. 1972), *modified*, 411 U.S. 655 (1973). Moreover, this Court has previously observed:

> [I]t is late in the day for defendants to argue for the restrictive interpretation which they now urge. It has long since been authoritatively settled that the Act prohibits *all* discharges of polluting matter (other than sewage) into navigable waters, regardless of its source or continuing nature and irrespective of its effect upon navigation. *United States* v. *Maplewood Poultry Company*, 327 F. Supp. 686, 688 (D. Me. 1971) (citations and footnote omitted).

Defendants contend, however, that "since it would be unreasonable to infer that Congress contemplated that [Section 13] would outlaw all lawful modes of commercial navigation, [Section 13] should not be applied to log driving, which is undeniably a lawful form of navigation." The argument is that "in 1899 Congress was fully aware (a) that log driving was an important form of commercial navigation, and (b) that every log drive inevitably involved some degree of sinkage of logs and bark." From these two factual propositions—which the Court will accept as amply supported by the record—defendants say "it logically follows that in 1899 Congress must have realized that a legal prohibition against sinkage would be tantamount to a legal prohibition against log driving itself"—a result which could not have been in the contemplation of Congress, which in 1899 clearly contemplated that log driving would continue as a lawful, recognized form of commercial navigation.

The fundamental defect inherent in defendants' argument is that, as the Court of Appeals has made clear, Section 13 does not prohibit, but merely subjects to regulation, the discharge of refuse matter into navigable waters. In the language of the Court of Appeals,

> Section 13 does not operate as a complete prohibition on any activity. Discharge of refuse is illegal only if no permit is obtained beforehand. There is a vast aray of human activity, particularly commercial activity, which requires prior governmental permission. But one does not in common sense terms think of such activity as prohibited. Rather, it is thought that it is limited or controlled. The very sweep of section 13 argues against the view that Congress could have meant it as a stark ban on all behavior encompassed within its broad terms. Instead, it was envisaged as a means of regulating and bringing under scrutiny actions which might threaten the well-being of the nation's waterways. . . . Congress, in retaining the applicability of section 13 to log driving, did not legalize log driving and at the same time prohibit its unavoidable side effects and so produce a contradictory result. It merely quite logically exempted it from the absolute ban of section 15[5] while retaining the much more limited restriction produced by section 13. 491 F.2d at 568-69.

In light of this analysis, this Court must reject defendants' premise and the argument based thereon. To the extent Section 13 establishes a regulatory scheme for controlling pollution, there is no inherent conflict between Congress' desire to authorize log driving and at the same time to subject it to such restrictions as may be necessary to minimize the adverse ecological impact of log driving upon navigable waters.[6]

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[5] *See* n.2, *supra*.

[6] The flaw in defendants' position is also present in their assertion that the government's interpretation of Section 13 would necessarily render unlawful the unavoidable discharges of oil from properly operating vessels, thereby bringing to a halt all navigation by ship, a result clearly not intended by Congress. As the government points out, discharges from properly operating vessel

III

Propriety of Summary Injunctive Relief

The United States asserts that, this Court having found that defendants' log-driving activities violate Section 13 of the Rivers and Harbors Act, it should summarily issue an injunction flatly prohibiting all log driving on the Kennebec until such time as defendants obtain from the Environmental Protection Agency a permit for further log-driving operations.[7] In addition, the government asks for a mandatory order directing defendants to submit a plan "for the restoration of the Kennebec River to its natural condition."

The government's request for immediate injunctive relief ignores the admonition of the Court of Appeals that if this Court finds a violation of Section 13, "it will then be faced with the question of appropriate relief," and that

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engines have been exempted *by regulation* from the otherwise complete coverage of the oil spill provisions of the Federal Water Pollution Control Act, 33 U.S.C. § 1161 (1970) [now recodified as 33 U.S.C. § 1321 (1974 Supp.) as amended in 1972], for the very reason that such an exception was "necessary and proper if there is to be traffic upon the seas and inland navigable waters." United States v. Boyd, 491 F.2d 1163, 1169 (9th Cir. 1973).

[7] The authority of the Secretary of the Army to issue permits under Section 13 of the Rivers and Harbors Act terminated on October 18, 1972 when Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, comprehensive legislation providing for national water quality standards and for a federal permit program relating to the discharge of pollutants into navigable waters. Section 402 of the 1972 Act, 33 U.S.C. § 1342, prohibits further issuance of permits under Section 13 of the Rivers and Harbors Act and designates the Administrator of the Environmental Protection Agency as the exclusive authority to permit the discharge of pollutants into navigable waters. *See generally* United States v. Pennsylvania Industrial Chemical Corp., *supra*, 411 U.S. at 657 n.2, 658 n.7, 659 n.9.

any equitable decree, either affecting future log driving or requiring the removal from the river bottom of sunken logs and peeled bark, must be framed in the light of a series of factual considerations as to which no proof has yet been offered, 491 F.2d at 571. Insofar as prospective relief is concerned, such factual considerations will include the availability of a permit from the Environmental Protection Agency; the extent to which any equitable decree curtailing future log driving should require, at most, only such changes in defendants' present operations as may be necessary to bring them into compliance with present national policy as exemplified in the 1972 Amendments to the Federal Water Pollution Control Act; and the extent to which the economic and practical burdens which an abrupt termination of the log drive would cause may outweigh any harm which might be done to the river during the brief period between now and October 1, 1976, when Scott has agreed to terminate its log drives on the Kennebec and the Maine Legislature has decreed that log driving on all Maine rivers must cease.

In determining what, if any, retrospective relief will be appropriate, the factual questions to be canvassed will require consideration of such questions as the extent to which the current condition of the Kennebec River is attributable to defendants' log-driving activities, as opposed to other pollutant discharges (such as municipal sewage) and the log-driving activities of other present or former members of the Kennebec Log Driving Company during the last 140 years; the extent to which efforts to remove sunken logs and bark deposits from the river bottom might cause greater environmental damage by disturbing the riverbed than will result from their continued presence on the bottom; and the extent to which defendants may have reasonably relied on long-standing government action or inaction in conducting their log-driving activities since passage of the 1899 Act.

While the Court of Appeals did not specifically mention all of the foregoing factors, that court expressly recognized that "the burden of removing all of the logs which may have sunk to the bottom of the river in seventy-three years is obviously an extremely heavy one," 491 F.2d at 571, and noted that "[t]he requirements of fairness invoked by the Court in *United States* v. *Pennsylvania Industrial Chemical Corp., supra,* in gauging the propriety of criminal sanctions, may also apply when extreme hardship may be caused by an equity decree in this type of case." *Idem.* In effect, the Court of Appeals has directed this Court, having reached the issue of relief, to address itself to a variety of complex and technical factual issues which will require a more comprehensive record than is presently available in order for the Court to frame an appropriate equitable decree. *Cf. United States* v. *Rohm & Haas Co.,* 500 F.2d 167, 177 (5th Cir. 1974); *United States* v. *Stocco Homes, Inc.,* 359 F. Supp. 672 (D. N.J.), *vacated and remanded,* 498 F.2d 597, 611-12 (3rd Cir. 1974), *cert. denied,* 420 U.S. 927 (1975); *United States* v. *Ira S. Bushey & Sons, Inc.,* 363 F. Supp. 110, 121 (D. Vt.), *aff'd,* 487 F.2d 1393 (2d Cir. 1973), *cert. denied,* 417 U.S. 976 (1974); *United States* v. *Kentland-Elkhorn Coal Corp.,* 353 F. Supp. 451, 455 (E.D. Ky. 1973).

IV

Defendants' motion for summary judgment is denied. Plaintiff's motion for summary judgment, to the extent it seeks a declaration that Section 13 of the Rivers and Harbors Act of 1899 is applicable to defendants' log-driving activities on the Kennebec River, is granted. Plaintiff's motion for summary judgment, insofar as it seeks summary injunctive relief, is denied. The action will be assigned for a further pretrial conference as soon after September 1, 1975 as the Court's calendar permits for the consideration of such further proceedings as may be necessary to enable the Court to frame an equitable decree granting appropriate relief.

IT IS SO ORDERED.

Dated at Portland, Maine, this 7th day of August 1975.

/s/ EDWARD T. GIGNOUX
United States District Judge

CERTIFICATE

In accordance with 28 U.S.C. § 1292(b), I hereby certify that in my opinion the foregoing order involves a controlling question of law as to which there is substantial ground for difference of opinion (the controlling question of law being as to whether or not Section 13 of the Rivers and Harbors Act of 1899 applies to defendants' log-driving activities on the Kennebec River) and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

/s/ EDWARD T. GIGNOUX
United States District Judge

Dated: August 7, 1975.

A TRUE COPY.
ATTEST: Earl S. Laidlaw, Clerk

By /s/ E. CLARITY
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 75-1357

UNITED STATES OF AMERICA,
PLAINTIFF, APPELLEE,

v.

KENNEBEC LOG DRIVING COMPANY, et al.,
DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

[399 F. Supp. 754]

(Hon. EDWARD T. GIGNOUX, *U.S. District Judge*)

Before COFFIN, *Chief Judge*,
MCENTEE and CAMPBELL, *Circuit Judges*.

Roberts B. Owen, with whom *William D. Iverson, Covington & Burling, Vincent L. McKusick, Daniel E. Boxer, Pierce, Atwood, Scribner, Allen & McKusick, John W. Philbrick, Verrill, Dana, Philbrick, Putnam, & Williamson, Norman M. Heisman*, and *Ellis A. Horwitz* were on brief, for appellants.

Walter Kiechel, Jr., Acting Assistant Attorney General, with whom *Peter Mills*, United States Attorney, *Edmund B. Clark*, and *Carl Strass*, Attorneys, Department of Justice, were on brief, for appellee.

February 18, 1976

COFFIN, *Chief Judge*. In 1971, the United States filed a suit against the Kennebec Log Driving Company, a Maine chartered membership corporation which has conducted annual log drivers on the upper Kennebec River since 1835, and against its only present members, codefendants Scott Paper Company and Hudson Pulp and Paper Corporation (collectively, KLD). The action was grounded on Sections 10 and 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 403, 407. Plaintiff, claiming that the sinking of logs and bark fragments incident to a log drive was "refuse" under the Act, sought an injunction against future log driving activities and an order requiring affirmative action to remove from the river the consequences of past log driving activities.

In the first phase of this litigation, the district court granted summary judgement for KLD, holding that the Act of May 9, 1900, 33 U.S.C. § 410, authorizing log driving on certain rivers where such activity was dominant, exempted log driving on the Kennebec from all the provisions of the Rivers and Harbors Act of 1899. *United States* v. *Kennebec Log Driving Co.*, 356 F. Supp. 344 (D. Me. 1973). We reversed, holding that while § 410 expressly repealed the absolute bar to log driving, and any prohibition of the use of log booms, contained in §§ 10 and 15 of the Rivers and Harbors Act, 33 U.S.C. §§ 403, 409, it left intact § 13, 33 U.S.C. § 407 [hereinafter § 13], which prohibited the discharge of any refuse unless accomplished under a permit from the Secretary of the Army. We remanded the case to the district court, concurring in its holding that § 13 was facially applicable to defendants' activities, but leav-

ing open whether some deposits of material into navigable waters were so intimately related to a particular form of navigation, such as log driving, that the Congress did not intend such deposits to be considered "refuse". 491 F.2d 562, 570 (1973), *cert. denied,* 417 U.S. 910 (1974).

On remand the district court held that § 13 did apply to KLD's log driving activity. It noted that the section proscribed the discharge of "any refuse matter of any kind" without prior permission from the Secretary of the Army, and that peeled bark and sunken logs fell within this description and within the compass of "refuse" as that term was made clear in *United States* v. *Standard Oil Co.,* 384 U.S. 224 (1966). The district court rejected defendants' argument that Congress knowing (a) that log driving was an important form of navigation and (b) that some sinkage of logs and bark were inevitably involved in any log drive, could not have intended to proscribe the sinkage of waterlogged logs and bark fragments. Relying on our opinion; 491 F.2d at 568-69, that § 13 was not an absolute bar but a bar subject to permission granted on certain conditions, the district court saw no conflict between Congress' desire to permit log driving and a submission of this activity to regulation through permits calculated to minimize pollution.

It therefore granted the government's motion for summary judgment for a declaration that § 13 was applicable to KLD's log driving activities, but reserved consideration of the issue of injunctive relief and certified the question of liability under 28 U.S.C. § 1292(b). *United States* v. *Kennebec Log Driving Co.,* 399 F. Supp. 754 (D. Me. 1975).

Defendants present an intricate and tightly woven argument which can be telescoped into the following points. (1) Section 13 is predominantly prohibitory; its regulatory aspects are purely within the discretion of the Secretary of the Army. *United States* v. *Pennsylvania Indus. Chem. Corp.,* 411 U.S. 655, 662 (1973) (PICCO). (2) The breadth

and stringency of the prohibition are so extreme, and the possibility of exemption through unrestricted discretion so remote, that Congress could not have intended the bar of § 13 to apply to incidents of normal commercial navigation. (3) If § 13 applies to log drives, it must also apply to the traffic of river vessels. This construction would render all voyages of all vessels in the past 70 years illegal. (4) The inaction of the Secretary of the Army for three-quarters of a century, in failing to insist on a pollution discharge permit for any log drive, is an administrative interpretation that § 13 is not applicable to defendants' business.

It has been argued that any such search for Congressional intent is made irrelevant by *United States* v. *Standard Oil Co.,* 384 U.S. 224, 229 (1966), where the court, referring to the broad coverage of the Act of "any refuse matter of any kind or description", s. .ed that "[m]ore comprehensive language would be difficult to select." This language is sufficient for our brother Campbell. But we hesitate to rest on it, since the Court did not have to face the question whether refuse which is a normal incident of lawful navigation constituted an implied exception. And in our prior opinion we left this question open, concluding only that § 13 could logically survive the 1900 repeal of the absolute bar to log driving. We therefore examine the thrust of the argument that Congress could not possibly have intended the Act to apply to this kind of case.

The defendants' argument is compelling in the abstract: Congress would not have wanted to subject the important activity of log driving to extermination under the Refuse Act. But, having in mind that the Act provided for the issuance of permits at the discretion of the Secretary, we ask whether Congress would prefer that the courts create a judicial exception for log driving (or vessel traffic), thus giving carte blanche to any pollution creating effects, or that the Secretary of the Army initiate a permit system, thus providing a system to place limits on pollution which

may legally be caused. This, in a sense, is an academic question because through wisdom, oversight, or timorousness of the Secretary, the issue did not arise. But we think it is a question essential to the necessarily artificial analysis of original Congressional intent.

We are helped in our attempt to devine the Congressional intent of 1899 by our knowledge of the limitations embodied in our institutions. If Congress, as the defendants would have it, left to the judiciary the delineation of exceptions discovering normal incidents of commercial river navigation, the courts would have been required to pass upon a series of nice distinctions which arise in areas outside their expertise. The courts, in the context of specific cases, would have to face the task of defining "normal" or "acceptable" log driving. In addition to the problems of collecting and analyzing commercial, engineering, and pollution data, they would have to pass judgment on the maximum acceptable frequency of drives, condition and quantity of logs, seasonal considerations, places, duration and quantity of permitted storage.[1] Reference to the implementing regulations under the Federal Water Pollution Control Act, 33 U.S.C. § 1321(b)(3) *as amended,* relating

[1] Defendants claim the problem would not be this complex. They postulate that § 13 was devised to permit "use" but not "abuse" of the waterways. They say a user, i.e., someone engaged in the legitimate commercial navigation was intended to be excepted from the act, while an abuser, i.e., someone else "whose activities, on the face of things, represented an abuse of public resources" would have the burden of persuading the Secretary to grant a permit. We do not see how such a distinction squares with the sweep of the Court's definition of "refuse" in *Standard Oil.* If the act forbids the discharge into a river of a container of sludge located on shore, it must also forbid the pumping of bilge containing similar waste. If the Act forbids the choking of an inlet from the discharge of sawmill waste, it must forbid the same result accomplished by a pile of a neglected raft of logs. Yet if some activities relating to commercial navigation are clearly covered by the Act, the distinction between "users" and "abusers" becomes useless.

to the discharge of oil, 40 C.F.R. §§ 110.1-110.9 (1975), illustrates the detail and scope of the necessary provisions.[2] When we confront the clear, cold reality of describing what we would be excluding from the scope of § 13, we conclude that we would be entering the field reserved to the agencies or the Congress,[3] with too much demand for specificity to be the function of the courts.

The argument that Congress could not have meant the Act to carry its literal meaning, leaving to discretionary administrative action exemption for normal navigation, assumes the worst and ignores the availability of standard safeguards against administrative abuse. It assumes that

[2] These regulations were promulgated pursuant to the Federal Water Pollution Control Act of June 30, 1948, as amended prior to October 18, 1972, 33 U.S.C. §§ 1151-71. The Federal Water Pollution Control Act, as amended in its entirety by Act of October 18, 1972, 33 U.S.C. §§ 1251-376, has superseded the 1948 Act but no similar regulations have been promulgated pursuant to its authority. We assume that the cited regulations are still in force.

Some idea of the variety and complexity which would be involved in refuse regulation of log driving can be gleaned from a scrutiny of the Corps of Engineers' regulations concerning navigation, 33 C.F.R. Ch. II, Part 207 (1975), a number of which apply to log driving activities.

[3] Indeed, the account in *United States* v. *Boyd,* 491 F.2d 1163 (9th Cir. 1973), of the legislative history of the 1970 Act suggests what the attitude of Congress might well be when confronted with the task of drafting specific exceptions to a broad-based statutory proscription. The opinion quotes the following remarks for the Senate senior conferee, Senator Muskie:

> "It was conceivable that de minimis quantities of oil ought not to be subject to the notice provisions and ought not to be subject to the penalty provisions of the law. It was difficult to define these quantities in the statute.
>
> "The definition, we felt, would depend upon more extensive study than we could give, and even if we were in a position to give that kind of study, there were other reasons why such specificity ought not to be included in the law." 491 F.2d at 1167 n.4.

the Secretary would act capriciously, with Draconian zeal, and without check to its fiat. Were this to happen, judicially cognizable defenses exist to deal with such uses of prohibitive powers. Discriminatory and selective enforcement would be vulnerable to legal challenge. *See Yick Wo* v. *Hopkins,* 118 U.S. 356, 373-74 (1885). Were the Secretary to apply the Act in an arbitrary and capricious manner, a court action would be available to mandate reasonable action. *See Work* v. *United States ex rel. Rives,* 267 U.S. 175, 183-84 (1925). Finally, there exists the safeguard of legislative response to administrative action. After Congress, in the 1970 Federal Water Pollution Control Act, barred "harmfull" oil discharges, the Secretary of the Interior issued regulations making no exception for oil discharges from properly operating vessel engines. Congress responded with hearings and an exception was added to the regulations which was subsequently upheld in *United States* v. *Boyd,* 491 F.2d 1163 (9th Cir. 1973). Defendants make the point that if this action had been brought against KLD in late 1899, Congress would probably have responded similarly, and both the Secretary and the courts would have acquiesced. This may be true, but absent the occasion, we can only speculate, observing, however, that it is likely that fairly complex standards would have been promulgated to govern the exemption.

In sum, it is just as reasonable for us to suppose that Congress intended broad coverage of the Act and sensible administrative action as that it implicitly intended to exclude a wide range of activities that the Act facially encompassed.

This brings us to the argument that the Secretary never interpreted § 13 to apply to log drives. This administrative interpretation would have been entitled to some weight were it not for *PICCO*. But, in that case, the Court confronted the fact that until December, 1970, the Army Corps of Engineers had consistently construed § 13 as limited to

deposits of refuse affecting navigation. This fact, however, was assumed to have no bearing on the question of whether § 13 applies to deposits that have no tendency to affect navigation—at least since the Court's decision in *Standard Oil, supra*. Administrative practice was not germane to a finding of violation, but reliance on such practice was held to be available as a defense in a criminal prosecution. 411 U.S. at 674.[4]

We therefore affirm the district court's conclusion that § 13 is applicable to defendant's log driving activities.[5] Defendants have suggested that such a ruling be applied only prospectively, on the ground that the issue involved here is one "of the first impression whose resolution was not clearly foreshadowed". *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, 106 (1971). We think that the question of the

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[4] Defendants make one additional argument—that their actions did not come within the words of the statute—"'deposit" "cause" or "suffer"—because the only way to avoid sinkage would have been to abstain from log driving. This, however, is only a semantically different version of the earlier argument we have considered in the text.

[5] While we have no occasion so to hold, it might be inferred that § 13 is also applicable to vessel navigation. It is possible, however, that vessel traffic raises problems unaddressed in the present litigation. While a ruling holding § 13 applicable to oil seepage from normal lawful navigation would render past voyages of vessels illegal under the Refuse Act, it would have little practical importance today. The permit program authorized by the Refuse Act is now administered by the Environmental Protection Agency under the Federal Water Pollution Control Act. (FWPCA) 33 U.S.C. § 1342(a)(5). Whatever the status of vessel navigation under the Refuse Act, discharges from properly operating vessel engines have been exempted by regulation from the otherwise complete coverage of the oil spill provisions of the FWPCA. 33 U.S.C. § 1321. *See United States* v. *Boyd, supra.* As a corollary, it is clear that oil discharged from vessels which is not normal seepage from a properly operating engine is subject to the proscriptions and penalties of the FWPCA.

availability and extent of retrospective relief would be more properly considered in the district court on remand.

Affirmed.

CAMPBELL, *Circuit Judge* (concurring). I concur in the result, although I am not sure I follow the reasoning of the court in all respects. I find it enough that the Supreme Court's interpretation in *United States* v. *Standard Oil* is the controlling interpretation of the statute today, including, functionally, of the "legislative intent." Whether it is a revisionist interpretation or not, it is binding upon us. Whatever people may once have thought, § 13 now means what the Court in *Standard Oil* said. It follows that as the pollutants in question are "refuse" under § 13, the statute applies. And I agree with the court that since § 13 allows administrative permits, those rather than judicially created exceptions would be the congressionally preferred means for excepting special types of refuse as to which an exemption might be in order.

Obviously, different questions arise when one considers the equities of imposing clean-up requirements for actions that may have been undertaken in good faith under an earlier construction of the law. The district court, like ourselves, has shown itself to be well aware of these issues, which will be the subject of future hearings on the question of relief.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 75-1357.

UNITED STATES OF AMERICA,
PLAINTIFF, APPELLEE,

v.

KENNEBEC LOG DRIVING COMPANY ET AL.,
DEFENDANTS, APPELLANTS.

JUDGMENT

Entered February 18, 1976

This cause came on to be heard on appeal from the United States District Court for the District of Maine, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed.

By the Court:

/s/ DANA H. GALLUP
Clerk.

[cc: Messrs. Owen and Keichel.]

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 75-1357.

UNITED STATES OF AMERICA,
PLAINTIFF, APPELLEE,

v.

KENNEBEC LOG DRIVING COMPANY ET AL.,
DEFENDANTS, APPELLANTS.

Order of Court

Entered March 17, 1976

Upon consideration of appellants' motion for stay of mandate and opposition thereto,

It is ordered that the motion for stay of mandate is hereby denied.

By the Court:

/s/ DANA H. GALLUP
Clerk.

[cc: Messrs. Owen and Kiechel.]

APPENDIX E

Statutory Appendix

33 U.S.C. § 407

(SECTION 13 OF THE RIVERS AND HARBORS ACT OF 1899)

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided,* That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further,* That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

33 U.S.C. § 409

(SECTION 15 OF THE RIVERS AND HARBORS ACT OF 1899)

It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as "sack rafts of timber and logs" in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. . . .

33 U.S.C. § 410

(ACT OF MAY 9, 1900)

The prohibition contained in section 409 of this title against floating loose timber and logs, or sack rafts, so called, of timber and logs in streams or channels actually navigated by steamboats, shall not apply to any navigable river or waterway of the United States or any part thereof whereon the floating of loose timber and logs and sack rafts of timber and logs is the principal method of navigation. But such method of navigation on such river or waterway or part thereof shall be subject to the rules and regulations prescribed by the Secretary of the Army as provided in this section.

The Secretary of the Army shall have power, and he is authorized and directed to prescribe rules and regulations, which he may at any time modify, to govern and regulate the floating of loose timber and logs, and sack rafts, (so called) of timber and logs and other methods of navigation on the streams and waterways, or any thereof, of the character, as to navigation, heretofore, in this section

described. The said rules and regulations shall be so framed as to equitably adjust conflicting interests between the different methods or forms of navigation; and the said rules and regulations shall be published at least once in such newspaper or newspapers of general circulation as in the opinion of the Secretary of the Army shall be best adapted to give notice of said rules and regulations to persons affected thereby and locally interested therein. . . .

FILED
JUL 2 1976
MICHAEL RODAK, JR., CLERK

No. 75-1594

In the Supreme Court of the United States

OCTOBER TERM, 1975

KENNEBEC LOG DRIVING CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

PETER R. TAFT,
Assistant Attorney General,

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In the Supreme Court of the United States

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KENNEBEC LOG DRIVING CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B, pp. 14a-22a) is reported at 530 F. 2d 446. The opinion of the district court (Pet. App. A, pp. 1a-13a) is reported at 399 F. Supp. 754.

JURISDICTION

The judgment of the court of appeals (Pet. App. C, p. 23a) was entered on February 18, 1976. The petition for a writ of certiorari was filed on April 30, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the deposit of sunken logs and log fragments into navigable waterways, incident to commercial

log-driving operations, is covered by Section 13 of the Rivers and Harbors Act of 1899.

STATUTORY PROVISIONS INVOLVED

Sections 13 and 15 of the Rivers and Harbors Act of 1899, 30 Stat. 1152, 33 U.S.C. 407 and 409, and the relevant provisions of the Act of May 9, 1900, 31 Stat. 172, 33 U.S.C. 410, are set forth at Pet. App. E, pp. 25a-27a.

STATEMENT

The United States brought this action in 1971 to enjoin petitioners from continuing to use the Kennebec River in Maine for log drives and to require them to remove from the river any refuse deposited by them during past log-driving activities. The complaint asserted that petitioners' operations on the Kennebec River—specifically, their preemption of the surface of the river with floating logs and log booms and the resulting deposit of decaying logs and log fragments on the river bottom (which had consumed all the oxygen in the water, thereby preventing acquatic life)—had occurred and were occurring in violation of Sections 10 and 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403 and 407.

Petitioners' principal defense was that the Act of May 9, 1900, 33 U.S.C. 410, superseded the entire 1899 Act with respect to log driving and subjected log drivers only to such regulations as the Secretary of the Army may impose, and none were imposed here.[1] The district

[1]Petitioners conceded that the portion of the Kennebec River affected by their log-driving activities is navigable, within the meaning of the Rivers and Harbors Act, and that they have never applied for or obtained a permit from the Secretary of the Army authorizing those activities (see Pet. App. A, p. 2a, n. 1).

court, in a decision rendered before this Court's decision in *United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, granted petitioners' motion for summary judgment and dismissed the complaint, holding that in light of the Act of May 9, 1900, neither Section 10 nor Section 13 of the Rivers and Harbors Act applies to log driving on the Kennebec River. 356 F. Supp. 344 (D. Me.).

The court of appeals vacated the judgment of the district court. It held that the 1900 Act superseded Sections 10 and 15 of the 1899 Act (which deal with obstructions to navigation) but that nothing in the 1900 Act or its legislative history exempts log driving from the restrictions on pollution contained in Section 13 of the 1899 Act. Although the court thus held that Section 13 is "facially applicable" to petitioners' log-driving activities and that "pealed bark and sunken logs on the river bottom are deposits of 'refuse matter' within the meaning of Section 13," it nevertheless remanded the case to the district court to determine whether petitioners' deposit of sunken logs and log fragments are "so intimately related to the actual conduct of navigation by water that despite the facial applicability of [Section 13] it could not have been in the contemplation of Congress that it apply in such instances" (491 F. 2d 562, 570 (C.A. 1)).[2] This Court denied the petition for a writ of certiorari filed by the present petitioners. 417 U.S. 910.

[2]In response to the government's motion for reconsideration, which pointed out that the court's opinion could be construed as an implicit ruling that Section 13 of the 1899 Act is not applicable to deposits of refuse "intimately related to the actual conduct of navigation by water," the court of appeals amended its opinion to make clear that it meant "to intimate no view as to whether or not any such interpretation of the language of the statute can be justified, nor, if it can, whether [petitioners] can take advantage of it" (491 F. 2d at 570-571, n. 27).

On remand, the district court held that although the deposit of some refuse matter is an unavoidable incident of log driving, "Section 13's all-inclusive coverage of 'any refuse matter of any kind or description whatever' " precludes a judicially-created exception such as that suggested by petitioners (Pet. App. A, p. 7a). The court also specifically rejected petitioners' assertion that since Congress, in the 1900 Act, had made log driving on rivers such as the Kennebec a lawful form of navigation, it could not have intended to leave intact the restrictions on such activity contained in Section 13 of the 1899 Act (*id.* at 9a; footnote omitted):

> To the extent Section 13 establishes a regulatory scheme for controlling pollution, there is no inherent conflict between Congress' desire to authorize log driving and at the same time to subject it to such restrictions as may be necessary to minimize the adverse ecological impact of log driving upon navigable waters.

The court therefore granted the government's motion for a declaratory judgment confirming the applicability of Section 13 of the Rivers and Harbors Act of 1899 to petitioners' log-driving activities. But it reserved ruling on the government's request for injunctive relief, pending "such further proceedings as may be necessary to enable the [c]ourt to frame an equitable decree" (*id.* at 12a), and it certified pursuant to 28 U.S.C. 1292(b) the issue of the coverage of Section 13. The court of appeals permitted an interlocutory appeal and affirmed, leaving to the district court "the question of the availability and extent of retrospective relief" (Pet. App. B, pp. 21a-22a).

ARGUMENT

1. The government's original request for injunctive relief prohibiting petitioners from continuing to use the Kennebec River for log driving, in the absence of a permit authorizing such use, has been rendered largely academic by the enactment by the Maine legislature of a statute prohibiting all log driving on Maine rivers as of October 1, 1976 (38 Maine Rev. Stat. Ann. 418 (1975 Cum. Supp.)), and by petitioners' publicly-stated intention to end their log drives on the Kennebec "no later than October 1, 1976" (see Pet. 6-7). Moreover, as already noted, the district court has reserved ruling on the government's only remaining request for relief—an order directing petitioners to submit a plan to restore the Kennebec—pending further proceedings in that court (Pet. App. A, p. 12a). If, at the conclusion of this case, the government's request for an order requiring petitioners to assist in the removal from the Kennebec of refuse deposited by them in connection with their log-driving activities is denied, petitioners would no longer have any cause for complaint. We therefore believe that the present petition is premature and on that basis alone should be denied.

2. The decision below is, in any event, correct, and further review is not warranted. Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. 407, prohibits, in pertinent part, the discharge into navigable waters of the United States of "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state" unless prior authorization is obtained from the Secretary of the Army. This Court has emphasized repeatedly that this language means precisely what it says: that is, that "[t]he word 'refuse' includes all foreign substances and pollutants apart from those 'flowing from

streets and sewers and passing therefrom in a liquid state' into the watercourse" (*United States* v. *Standard Oil Co.*, 384 U.S. 224, 230; see also *United States* v. *Pennsylvania Industrial Chemical Corp., supra*, 411 U.S. at 669; *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 101; *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 490-491).

Petitioners apparently concede that the sunken logs and log fragments deposited by them in the Kennebec River are "refuse matter," within the meaning of Section 13 (see Pet. App. A, pp. 5a-6a). They contend, however, that Section 13 cannot reasonably be construed to apply to such matter because (1) Congress was aware at the time it enacted the Act of May 9, 1900, 33 U.S.C. 410, that the deposit of sunken logs and log fragments occurs inevitably in any log drive; (2) Congress nevertheless concluded that log driving should be permitted to continue on rivers such as the Kennebec where it had been the principal form of navigation; and (3) the practical impact of holding that Section 13 applies to log driving is to render all log driving illegal—a result squarely at odds with express congressional intent.

Petitioners purport to find support for these contentions in *United States* v. *Pennsylvania Industrial Chemical Corp., supra (PICCO)*, and *Train* v. *National Resources Defense Council*, 421 U.S. 60. According to petitioners, this Court's conclusion in *PICCO* that the Secretary of the Army has no statutory duty to issue permits under Section 13 means that "the only way to harmonize the statute with the recognized Congressional purpose of allowing [log driving] to go forward is to hold the [statute] inapplicable to any unavoidable pollutional side effects which such navigation may have" (Pet. 14-15). Alternatively, petitioners assert that the fact that the Secretary of the Army has not undertaken to control,

through the issuance of permits, the deposit of refuse matter incident to commercial log-driving activities constitutes an administrative interpretation that Section 13 does not apply to such activities and that, under *Train*, the Secretary's interpretation of Section 13 is binding on the courts.

The fundamental defect in petitioners' contentions is, as the courts below noted (see Pet. App. A, pp. 8a-9a; Pet. App. B, pp. 20a-21a), that Section 13 does not absolutely prohibit the discharge of refuse into navigable waters; it simply subjects such discharges to administrative regulation in accordance with the stated purposes of the Rivers and Harbors Act. There is no inconsistency between Congress' decision, as expressed in the Act of May 9, 1900, to remove the absolute prohibition on log driving contained in Section 15 of the Rivers and Harbors Act, 33 U.S.C. 409, but to continue to subject that activity to reasonable administrative regulation designed to minimize the adverse effects of the consequent deposit of refuse matter. Indeed, petitioners' construction of the Act of May 9, 1900, would drastically curtail, if not nullify, Section 13 by relieving individuals of any obligation to comply with the permit provisions of that section whenever the particular activity at issue is otherwise "lawful." Nothing in the text or legislative history of the Act of May 9, 1900, supports petitioners' assertion that Congress intended thereby to modify or repeal Section 13 of the 1899 Act. At best, petitioners' contentions would create a repeal by implication, which should not be imputed to Congress. See *United States* v. *Jackson*, 302 U.S. 628, 631; *Posadas* v. *National City Bank*, 296 U.S. 497, 503.

This Court's decisions in *PICCO, supra*, and *Train* v. *National Resources Defense Council, supra*, are not to the contrary. The conclusion in *PICCO* that Section 13

of the Rivers and Harbors Act confers upon the Secretary of the Army discretion in deciding whether, and under what circumstances, to issue permits authorizing the discharge of refuse matter into navigable waters is entirely consistent with the conclusion that Congress intended in the Act of May 9, 1900, simply to modify the balance struck in the 1899 Act concerning obstructions to navigation resulting from log driving and steamboat traffic. *PICCO* does not support petitioners' assertion that Congress also intended in the 1900 Act to eliminate the requirement that log drivers, as well as other users of navigable rivers and harbors, secure permits before depositing refuse matter in those waters.

As to petitioners' argument that *Train* v. *National Resources Defense Council* requires that the administrative interpretation of a statute be given great weight, petitioners point to no regulation or ruling by the Secretary of the Army stating that Section 13 of the Rivers and Harbors Act does not apply to their activities. To be sure, the Secretary of the Army has not used the authority conferred by Section 13 to issue permits designed to minimize the damage to the environment caused by log-driving activities. But as this Court held in *PICCO*, even affirmative administrative action construing Section 13 cannot be relied upon to excuse actions that would otherwise violate that statute. 411 U.S. at 670-675. As the courts below recognized (Pet. App. A, p. 11a; Pet. App. B, pp. 20a-21a), moreover, the extent of petitioners' reasonable reliance upon long-standing governmental inaction with respect to commercial log driving may be relevant to the framing of appropriate equitable relief. But whether petitioners are entitled thus to benefit from such inaction depends upon the resolution of factual issues not yet fully explored by the district court.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1976.

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Supreme Court, U. S.
FILED
JUL 28 1976
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No. 75-1594

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

KENNEBEC LOG DRIVING COMPANY, SCOTT PAPER COMPANY, HUDSON PULP & PAPER CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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IN THE

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KENNEBEC LOG DRIVING COMPANY, SCOTT PAPER COMPANY, HUDSON PULP & PAPER CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Petitioners have requested the Court to grant a writ of certiorari in this case because (1) the Court of Appeals' decision embraces an interpretation of the so-called Refuse Act[1] diametrically opposed to this Court's authoritative construction of that statute in *United States* v. *Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655 (1973) (*"PICCO"*) and (2) the decision below, if allowed to stand, would impose upon an im-

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[1] Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407.

portant and Congressionally-sponsored industry the Hobson's choice of shutting down or facing the risk of substantial criminal and civil penalties as well as private damage suits.

The Brief for the United States in Opposition, after attempting to skew the Court's perception of the case by misstating the facts,[2] begins with a somewhat odd point; it emphasizes at the outset that the Government's demand for prospective injunctive relief "has been rendered largely academic by the enactment . . . of a [Maine] statute prohibiting all log-driving . . . as of October 1, 1976 . . . , and by petitioners' publicly stated intention to end their log drives . . . [by the same date]." (Brief in Opposition 5) In fact, the single remaining participant in the Kennebec Log Drive made this public announcement several months *before* this suit was filed. As far as prospective relief is concerned, therefore, this case has been "academic" from its inception.

The point, however, is irrelevant to this petition. The importance of this case has nothing to do with the Governmert's unnecessary request for prospective relief. The need for review by this Court stems rather from the fact that the decision below, if allowed to stand, would force logging operators throughout the country to halt immediately the water transportation of logs or face the risk of criminal or civil prosecution and possibly numerous private damage suits.

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[2] There is no evidence, nor is it the fact, that the logs and bits of bark which sink during the Kennebec log drives have "consumed all the oxygen in the water, thereby preventing acquatic [sic] life." (Brief in Opposition 2) The assertion has been made up out of whole cloth.

The Government does not contest the precedential importance of the decision below, nor the sizable magnitude of the industry affected (*see* Petition 12 & n.6). It does suggest that review would be premature because the District Court might, on remand, deny the Government's demand for retrospective relief to eliminate the supposed effects of log-driving on the Kennebec River. (Brief in Opposition 5) But this narrow focus upon the procedural posture of the case vis-a-vis the parties directly involved ignores the precedential importance of the decision below, which would not be affected by any further proceedings involving relief, and the possibility of damage litigation. In view of the latter threat, it is simply incorrect for the Government to say, as it does, that if all injunctive relief is ultimately denied, "petitioners would no longer have, any cause for complaint." (Brief in Opposition 5) The decision below raises the threat of most serious consequences, and it is completely final on the only issue as to which certiorari review is sought.[3]

The Government's argument that "the decision below is, in any event, correct" (Brief in Opposition 5) is equally wide of the mark. The issue at this point, of

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[3] It might be observed that if the Government in fact thinks it likely that the District Court will deny its request for retrospective relief, its reasons for filing this lawsuit would seem all the more mysterious. But even on this narrow point, if the Court of Appeals' decision on liability is (as petitioners' contend) erroneous, there is no reason why the District Court and the parties should be compelled to engage in expensive and time-consuming proceedings examining the supposed effects of log-driving on the Kennebec River and the alleged need for an enormously expensive and ecologically disruptive clean-up program.

course, is not the ultimate correctness of the decision below but whether review by this Court is appropriate. Both the District Court and the Court of Appeals, in certifying and accepting this case for interlocutory appeal under 28 U.S.C. § 1292(b), have taken the position that there is "substantial ground for difference of opinion" regarding the applicability of the Refuse Act to the necessary incidents of lawful navigation, and that consensus on the part of the courts below argues in favor of a final, authoritative determination by this Court.

It is important, at this stage, to prevent confusion regarding the question decided by the Court of Appeals. Contrary to the Government's apparent misunderstanding (Brief in Opposition 6-8), the issue is whether Congress, when it enacted the statute in 1899, intended the Refuse Act to apply to the necessary incidents of lawful navigation (whether bark "discharged" during log drives or motor oil "discharged" by vessel navigation (*see* Petition 8)), *not* whether it "repealed" that statute insofar as log-driving is concerned the following year by enacting the Act of May 9, 1900, 33 U.S.C. § 400. Consequently, no question of a "repeal by implication" arises. (Brief in Opposition 7)

Petitioners contend (a) that this Court has authoritatively construed the Refuse Act in *PICCO* as an absolute prohibition against deposits of refuse material into navigable waters, subject only to the wholly discretionary power of the Secretary of the Army to establish a permit program, and (b) that Congress could not logically have expected such a prohibitory statute to apply to the necessary incidents of lawful navigation—such navigation being, unquestionably, at least one of the activities the statute was enacted to

protect. The Court of Appeals rejected this argument by adopting an interpretation of the Refuse Act which is fundamentally at odds with the holding of *PICCO*. By its analysis, the Refuse Act should be viewed historically only as a regulatory statute.

Reasonable men could perhaps differ as to the prohibitory versus the regulatory thrust of the Refuse Act. But the Government cannot have it both ways. A basic sense of fairness—let alone logic—should lead this Court to correct a situation in which

> (1) persons prosecuted under the Refuse Act are precluded from defending on the ground that the required regulatory permit program has not been established— because the statute was intended to be prohibitory (*PICCO*),

while at the same time

> (2) persons whose only "deposits" of "refuse" are undisputedly the necessary incidents of lawful navigation are not allowed to argue that Congress could not have intended to prohibit navigation (which a prohibition against its necessary incidents would, of course, be tantamount to)—because the statute was intended to be merely regulatory (this case).

Congress did not contemplate nor should this Court countenance any such revolving door.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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